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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1581.

JOSEPH WOOD, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, STATE OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 5, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 6, 1891.

1 To the judges of the circuit court of the United States for the southern district of New York:

The petition of Joseph Wood respectfully shows:

First. That he is a citizen of the United States, of African race and de-cent, and black in color, and that he is deprived of his liberty by Augustus A. Brush, agent and warden of Sing Sing prison, in the southern district of New York, who threatens to put him to death in the week beginning December first, 1890, and that he is thus held in custody and deprived of his liberty against his will and in violation of the Constitution of the United States.

Second. The facts concerning the detention and the claim or authority by virtue of which he is so detained are as follows:

He was convicted of the crime of murder in the first degree, in the court of general sessions of the peace in and for the city and county of New York, on the 10th day of March, 1890, and sentenced upon such conviction to death under chapter 489 of the Laws of 1888 and committed to the custody of said Brush accordingly.

That the indictment upon which he was so arraigned was found by a grand jury at the October term, 1889, of said court, and he was convicted by a petit jury at the March term, 1890; that from the panels and lists of jurors whence said grand jury and petit jury were drawn and from said juries all persons of African race
2 and de-cent and black in color were excluded because and by reason of their said race, de-cent, and color, and that in said city, county, and State have always been excluded for a like reason; that he was arraigned to plead to said indictment upon the 28th day of October, 1889, and was then without counsel or any means of procuring counsel, and was required and did plead to said indictment in ignorance of his rights in the premises.

That upon the trial of said indictment he was ignorant of the facts aforesaid without his fault, and was therefore unable to challenge or otherwise object to the lists, panels, and array of grand and petit jurors for the ground aforesaid.

After his conviction aforesaid he learned the facts aforesaid in relation to the exclusion of such persons, and thereupon immediately, and with due and ordinary diligence according to the practice of said court, he duly moved therein, upon due allegation and tender of proof of the facts aforesaid, for a new trial—a copy of his said motion and of the affidavit in support thereof is hereto annexed, marked Exhibit "A," and made part of this petition—and according to law and the practice of said court such motion should have been entertained and decided upon its merits upon due consideration of the allegations and proof aforesaid, and upon due proof should have been granted, but the said court refused altogether to entertain his said motion or to pass upon his said contention upon proofs so tendered, and a time was thereupon fixed for putting him to death as aforesaid.

3 Whereby he has been deprived of all the privileges and just rights of citizens of the United States and of the equal

protection of the laws, and is in like manner deprived of his liberty and about to be deprived of his life without due process of law.

Your petitioner therefore alleges that the commitment aforesaid and the detention under the conviction and sentence aforesaid under said indictment are null, void, and of no force or validity, and he prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, agent and warden as aforesaid, requiring him to produce the body of said Joseph Wood before this court at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises; and at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of general sessions of the peace and the clerk thereof, commanding it or him forthwith to certify to said circuit court of the United States true copies of the lists of grand jurors for the October term, 1889, of said court; of lists and panels of trial jurors or additional trial jurors for the March term, 1890, of said court, and of the indictment, record, orders, and warrants and commitments in said court remaining under and by virtue of which said Joseph Wood is now deprived of his liberty by authority of that court.

JOSEPH WOOD,
By R. J. HAIRE.

4 CITY AND COUNTY OF NEW YORK, *ss:*

Robert J. Haire, being duly sworn, says: I am counsel for said Joseph Wood, the petitioner herein, and am duly authorized by him to make, subscribe, certify, and present the foregoing petition. I have read the same and know its contents; it is true, to my knowledge, information, and belief. The reason it is not verified by him is that he is in close confinement at Sing Sing prison and the week fixed for his execution begins on Sunday next, and there is not time, therefore, to have him verify it and to serve the writ without endangering his life.

ROBERT J. HAIRE.

Sworn to before me this 28th day of November, 1890.

GEO. A. HOOPE,
Notary Public, Suffolk County.

Cert. filed in N. Y. Co.

5 EX. "A."

Copy Motion and Affidavit.

The Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
JOSEPH WOOD. } Murder.

The defendant in the above-entitled cause, by his attorney, R. J. Haire, moves this court that the verdict of guilty heretofore ren-

dered be vacated and set aside, and that judgment upon such conviction be stayed and defendant granted a new trial upon the following grounds:

First. That the defendant is of the African race and black in color, and that all persons of this race and color were excluded in the drawing of the panel of the petit jurors, from which the trial jury herein was selected.

Second. That by reason of such exclusion the defendant was denied the equal protection of the laws and did not have the full and equal benefit thereof in the proceedings for the security of his life and liberty as is enjoyed by white persons, and to which he is and was justly entitled.

Third. That all persons of the African race and of color were excluded from the grand jury, by which the indictment against the defendant was found and upon which he was tried, and con-
6 sequently said indictment was illegal and void, and the defendant ought not to have been put upon trial upon said indictment, as said trial court was without jurisdiction.

Fourth. That persons of the African race and color have always been excluded from the list and drawings of both the grand and petit jurors in and for the city and county of New York, though there were and for many years last past have been many such persons qualified by law in all respects to sit as grand and petit jurors in this court and residing in the said city and county of New York.

Fifth. That the honorable recorder who presided at the trial as a member of the board who selected the grand jury by which defendant was indicted had judicial knowledge and notice of the exclusion of persons of said African race and color, and should have advised the defendant of such fact when called upon to plead, as defendant was without counsel and unable to procure the same.

Sixth. That the honorable recorder, sitting as trial judge had judicial knowledge and should have taken judicial notice of the fact of the exclusion, in manner aforesaid, of persons of the African race and color from the panel of petit jurors in attendance at the term of court and from which the jury in defendant's case was selected.

Seventh. That the entire proceedings herein were contrary to the just rights and interests of the defendant and not in accord-
7 ance with the guaranteed rights of the defendant. This motion is based upon the affidavit of the defendant, herewith filed, all proceedings in said cause, and the request to subpœna and examine witnesses concerning the material allegations in the affidavit of said Wood contained.

Dated October 31st, 1890.

R. J. HAIRE,
Attorney for Defendant,
23 *Chambers St., New York City.*

And now, before your honor rules upon this motion, I desire it to appear of record that the defendant further moves the court and demands that subpœnas be issued, directed to the commissioners of

jurors of the city of New York and to all other officers, clerks, and persons who are known to the court to possess personal knowledge of the facts relating to these matters alleged in the affidavit of defendant at this time filed, and whose testimony may enable defendant to establish the facts in said affidavit set forth, and that said commissioners and others be examined and their evidence taken in support of this motion and before the court passes upon the same.

R. J. HAIRE,
Attorney for Defendant.

8 Court of General Sessions of the Peace in and for the City and County of New York.

THE PEOPLE, &c.,
against
JOSEPH WOOD. } Murder.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph Wood, being duly sworn, deposes and says that he is the defendant in the above-entitled cause and was heretofore convicted of the crime of murder in the first degree upon an indictment found by the grand jury of the city and county — New York on the — day of ——, 1889, and that he, deponent, was arraign*ed* and plead to said indictment on the — day of ——, 1889, and that at the time he was so arraign*ed* he had no counsel and was represented by none, and that he was wholly without means to procure counsel, and that the plea of "not guilty" was entered without an examination of said indictment by counsel for deponent.

Deponent further says that he is a citizen of the United States and was born in the State of Virginia, and that he is of the African race and de-cent and black in color.

Deponent further says that there are at least several thousand citizens of the African race and de-cent and black in color who are and were and for more than ten years last past residents of
9 the city, county, and State of New York, and who are qualified in all respects to sit as grand and petit jurors in the court wherein this deponent was heretofore tried, convicted, and sentenced to death; that the officers authorised by the laws of the State of New York to select the names of and the persons to serve as grand jurors and petit jurors to serve for and in the court of general sessions of the peace of the city and county of New York selected no persons of the African race or of color to serve as such jurors, but, on the contrary, excluded all persons of such race and color from these to serve as and be drawn for jurors; that said officers in and for said city and county of New York drew from the list of these so selected to serve as grand jurors the grand jurors by whom the indictment against the defendant was found and drew from the list of these selected to serve as petit jurors the petit jurors before whom the defendant was to be and was tried for his life under said indictment, and that from both the grand and petit

jurors sitting in said court by whom the deponent was indicted and tried all persons qualified by law to serve as jurors who were persons of the African race and color were excluded because of their race and color, and that not one person of said African race and color was drawn or summoned, but that said grand and petit jurors were composed exclusively of white persons, and that, in fact, all persons, as deponent is informed and believes, of the African race, although qualified to serve as jurors, have always in said city, county, and State been excluded from serving upon jurys because of their race and color, and that by reason of such exclusion the said jurys have been composed wholly of the white race, and the defendant, in the finding of the said indictment and the trial thereupon, was denied the equal protection of the laws and did not have the full and equal benefit of all laws and proceedings in the said State of New York for the security of his person as is enjoyed by white persons.

Deponent asks that said judgment and verdict herein be set aside and a further hearing be granted and such proceedings had as may be consistent with defendant's just rights.

JOSEPH WOOD.

Subscribed and sworn to before me this 31st day of October, 1890.

N. S. LEVY,
Notary Public, New York City.

Endorsed: U. S. circuit court. *Ex parte* Wood, defendant. Petition for *habeas corpus*. R. J. Haire, 23 Chambers street, New York city, attorney for petitioner. U. S. circuit court. Filed Nov. 29, 1890. John A. Shields, clerk.

At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York, on the 28th day of November, 1890.

Present: Hon. Addison Brown, district judge.

Ex Parte JOSEPH WOOD.

A petition on the behalf of Joseph Wood having been duly presented to this court for a writ of *habeas corpus* to inquire into the cause of his detention at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, Esq., agent and warden of said prison, and for relief in the premises, now, on reading and filing said petition and after hearing Robert J. Haire, Esq., counsel for said petitioner, it is—

Ordered that the prayer of said petitioner be, and the same hereby is, in all things denied.

ADDISON BROWN.

Endorsed: U. S. circuit court. *In re* petition, &c., of Joseph Wood. *Ex parte* Wood. Order denying petition. R. J. Haire, 23 Chambers street, New York city. U. S. circuit court. Filed Nov. 29, 1890. John A. Shields, clerk.

12 In the Circuit Court of the United States for the Southern District of New York.

Ex Parte JOSEPH WOOD.

The petitioner in behalf of Joseph Wood, conceiving himself aggrieved by the final decision of this court declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record herein may be sent to the said Supreme Court.

Dated New York, Nov. 28, 1890.

R. J. HAIRE,
Attorney for Petitioner.

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to send to the Supreme Court of the United States forthwith a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, Nov. 28, 1890.

ADDISON BROWN,
District Judge.

Endorsed: U. S. circuit court. *Ex parte* Wood, defendant. Notice of appeal. R. J. Haire, 23 Chambers street, New York city. U. S. circuit court. Filed Nov. 29, 1890. John A. Shields, clerk.

13 UNITED STATES OF AMERICA, *ss:*

To the President of the United States to Augustus A. Brush, Esq., agent and warden of Sing Sing prison, State of New York:

CITY AND COUNTY OF NEW YORK, *ss:*

Robert J. Haire, being duly sworn, deposes and says that he is 39 years of age, and that on the 29th day of November, 1890, at Sing Sing, in the State of New York, he served a copy of the citation hereto attached on Augustus A. Brush, Esq., agent and warden of Sing Sing prison, in the State of New York, by delivering to him, said warden, a true copy of said citation, and at the same time showing to said warden the signature of Addison Brown, district judge, and also the seal of the court, both of which are attached to the citation hereto attached. He further says that he is personally acquainted with said warden and was so acquainted with him at the time of making said service, and knew him to be the person mentioned and described in said citation.

ROBERT J. HAIRE.

Subscribed and sworn to before me this 26th day of December, 1890.

GEO. A. HOOPER,
Notary Public, Suffolk Co., N. Y.

Cert. filed in N. Y.

14 By the Honorable Addison Brown, one of the judges of the circuit court of the United States for the southern district of New York in the 2d circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Augustus A. Brush, Esq., agent and warden of Sing Sing prison, in the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the city of Washington on the first Monday of January next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joseph Wood is appellant and said Augustus A. Brush, as agent and warden, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, on the 29th day of November, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] ADDISON BROWN,
District Judge.

R. J. HAIRE,
Attorney for Appellant, 23 *Chambers St., New York City.*

15 Endorsed: U. S. circuit court. *In re* petition of Joseph Wood. *Ex party* Wood. Citation. R. J. Haire, 23 Chambers street, New York city. Service of a copy of the within paper is hereby admitted. Dated Dec'r 1st, 1890. Chas. F. Tabor, att'y general. U. S. circuit court. Filed Dec. 27, 1890. John A. Shields, clerk.

16 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 15, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Joseph Wood, appellant, against Augustus A. Brush, as agent and warden, appellee, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of December, in the year of our Lord one thousand eight hundred and ninety and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1581. Joseph Wood, appellant, *vs.* Augustus A. Brush, agent and warden of Sing Sing prison, State of New York. Filed January 5, 1891.

Office Supreme Court U. S.
FILED.
MAR 2 1891
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR JOSEPH WOOD, APPELLANT;

ON PETITION AND NOTICE TO DISMISS, AFFIRM OR ADVANCE.

R. J. HAIRE,
Attorney for Appellant,
23 Chambers Street,
New York City.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 27th day of December, in the year of our Lord one thousand eight hundred and ninety and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1581. Joseph Wood, appellant, *vs.* Augustus A. Brush, agent and warden of Sing Sing prison, State of New York. Filed January 5, 1891.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR JOSEPH WOOD, APPELLANT;

ON PETITION AND NOTICE TO DISMISS, AFFIRM OR ADVANCE.

R. J. HAIRE,
Attorney for Appellant,
23 Chambers Street,
New York City.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR JOSEPH WOOD, APPELLANT;

ON PETITION AND NOTICE TO DISMISS, AFFIRM OR ADVANCE.

R. J. HAIRE,
Attorney for Appellant,
23 Chambers Street,
New York City.

United States Supreme Court.

OCTOBER TERM, 1890.

No. 1581.

In the Matter of the Appeal
of
JOSEPH WOOD.

STATEMENT.

See Statement pages 3 and 4 of Brief for Agent and Warden.

POINTS.

I.

The allowance of the Appeal from the denial of the Circuit Judge of the petition for a writ of habeas corpus is a matter of right.

Had the petition of the appellant contained no statements which warranted the Judge to whom the application for a writ was made, in determining that a question of Federal law was raised, the petition would have been ignored and no order made; but when the order denying the petition was once signed the right of appeal followed.

It is not necessary that there should be "a clear and irreconcilable antagonism between the Federal and State law, to allow the writ, Delaware *vs* Neal, 103 United States Supreme Court, page 370.

It is sufficient, so far as this case is concerned, that persons of African race and color were actually discriminated against in the selection of the grand and petit jurors in the city of New York. *Id.*

II.

The appellant makes no claim that the laws of the State of New York unjustly discriminate against persons of African race and color, but he does claim and insist, that such discrimination actually existed, of which fact he made proof as is shown by his affidavit marked Exhibit "A," and made a part of his petition (see Petition and Notice of the Attorney-General, page 15), and this brings it clearly within the case of Delaware *vs.* Neal.

III.

According to the law and practice in the State of New York, by which the Court will be governed in deciding this matter, a person on trial, and where in case of conviction the penalty is death, can waive no substantial rights he had, and any time after conviction may take advantage of any error which was actually prejudicial to him.

In this case the affidavit of the appellant which is made a part of the petition (see page 14 of the Petition and Notice to dismiss of the Attorney-General), shows that at the time he was arraigned he had no counsel, that he was wholly without means and that the plea of "Not guilty" was entered without examination of said indictment by any counsel.

The appellant once having pleaded "Not guilty" is not allowed, under the practice in New York, to

withdraw the plea, for any purpose, save to plead guilty; consequently the appellant could not have availed himself of the motion which he made at the time of the sentence (see page 12 Petition and Notice to dismiss of the Attorney-General), before he did.

IV.

The error complained of by the appellant is one which renders all proceedings under the indictment against him absolutely void, inasmuch as the defendant was deprived of his rights as guaranteed by the amendments to the Constitution of the United States, consequently it is clearly within the jurisdiction of this Court to hear and determine the question raised by petition of the appellant for writ of habeas corpus, as made and verified.

Appeal herein should not be dismissed or affirmed without argument, but the appellant has no objection to the advancing of the case to such day, for final judgment, as the Court may see fit to name.

R. J. HAIRE,

Attorney for Appellant,

23 Chambers Street, New York City.

Office Supreme Court U. S.
FILED
APR 3 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 189[illegible]

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR JOSEPH WOOD, APPELLANT.

R. J. HAIRE,

Attorney for Appellant,

New York City.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR JOSEPH WOOD, APPELLANT.

R. J. HAIRE,

Attorney for Appellant,

New York City.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR APPELLANT.

STATEMENT.

On the 28th day of November, 1890, the appellant, Joseph Wood, presented to the Circuit Court of the United States for the Southern District of New York, a petition setting forth in substance the facts following:

First.—That the petitioner was a citizen of the United States, of African race and descent, and black in color.

Second.—That he was imprisoned and threatened with death, within the Southern District of New York, by the appellee, Augustus A. Brush, as Agent and Warden of Sing Sing Prison, and that such imprisonment was unlawful and against the petitioner's will, and in violation of the Constitution of the United States.

Third.—That the claim of authority for the imprisonment was, that the petitioner was convicted, in the Court of General Sessions of the Peace in and for the City and County of New York, on the 10th day of March, 1890, of the crime of murder in the first degree, and sentenced to death under that conviction.

Fourth.—That the indictment upon which he was so convicted was found by a Grand Jury at the April Term, 1889, and the conviction was upon a verdict of a petit jury at the March Term, 1890.

Fifth.—That from the lists of jurors whence the said grand and petit juries were drawn, and from the said juries, all persons of

African race and descent and black in color were excluded because and by reason of their race, descent and color.

Sixth.—That the petitioner, when arraigned and required to plead to the indictment, was without counsel and without means to procure counsel, and was required to and did plead to the said indictment in ignorance of his rights.

Seventh.—That upon the trial the petitioner was ignorant of the facts aforesaid, without fault on his part, and by reason of such ignorance was unable to challenge or object to the lists, panels and array of the said grand and petit jurors upon the grounds aforesaid.

Eighth.—That after the conviction of the petitioner he learned the said facts relating to the exclusion of persons of African descent and race from the said lists of jurors; and thereupon, the petitioner proceeded with due diligence and upon due allegation and tender of proof, to move in the said court for a new trial.

Ninth.—That the said court refused to entertain the said motion and proceeded to appoint a time for the execution of the petitioner.

The petition concluded with a prayer for the issue of a writ of *habeas corpus* to the appellee, and a writ of *certiorari* to the said Court of General Sessions and to the clerk thereof.

The petition was accompanied by a copy of the motion made in the said Court of General Sessions, and of the affidavit read in support of that motion.

The Circuit Court of the United States thereupon made an order denying in all things the prayer of the said petition, and from that order this appeal is taken.

POINTS.

I.

This appeal must be heard and determined upon the order appealed from and the papers on which that order was made, the allowance of appeal and citation and proof of service,—in other words, upon the record.

The question now before this Court is, whether the Circuit Court erred in denying the application of the petitioner for writs of *habeas corpus* and *certiorari*. And since the action of the Circuit Court was predicated upon the petition and exhibits presented to it, the

question to be determined by this Court is, whether the papers presented to the Circuit Court made out a proper case for the issue of the writs.

The petition of the Attorney General of New York, recently presented upon the motion to affirm, dismiss or advance this appeal, contains allegations of various extraneous matters, some of which might perhaps have been properly set up upon the returns to the writs, if issued, and some of which might possible have been pertinent upon the motion to advance. But clearly none of them can be considered in the hearing of this appeal upon the merits.

II.

The trial and conviction of the appellant in the Court of General Sessions of the Peace in and for the City and County of New York amounted to a violation of the appellant's rights under the Constitution and laws of the United States, for the reason that citizens of African race and descent were excluded, because of their race and color, from the Grand Jury which found the indictment and from the petit jury which tried the issue.

1.—The proposition of law embraced in this contention is not open to discussion in this court. It has been expressly decided that when a colored citizen is a party to an action in a State court involving his life, liberty or property, "it *is* a right to which he is "entitled, that in the selection of jurors to pass upon his life, liberty "or property, there shall be no exclusion of his race, and no dis- "crimination against them, because of their color." and that "a "denial, upon the part of the officers charged with the duty of "selecting jurors, of his right to a selection of grand and petit jurors "without discrimination against his race, because of their race, would "be a violation of the Constitution and laws of the United States."

Neal v. Delaware, 103 U. S. 370, 394.
Strander v. West Virginia, 100 Id. 303.
Virginia v. Rives, Id. 313.
Ex-parte Virginia, Id. 339.

2.—The question of fact involved in our contention must be here determined in our favor.

There is no claim that the laws of the State of New York exclude from juries persons of African race or descent. The allegation of the petitioner is that, as a matter of fact, citizens of African race and descent were excluded from the lists and panels of jurors from which the grand and petit jurors in his case were drawn, and that such exclusion was because and by reason of their race, descent and color.

The averments are the same in substance and almost in the very same language as those made by the plaintiff in error in the case of *Neal v. Delaware* (*supra*).

In this case, as in that, these avertments were made both as a matter of pleading in his petition, and as a matter of evidence in the affidavit read upon the motion in the Court of General Sessions. And upon that motion, also, full tender was made of such further and sufficient proof of the averments as might be necessary.

And, as in the case cited, the averments made by the appellant stand entirely uncontradicted. Indeed it is noticeable that the petition of the Attorney General, although introducing several extraneous matters, most carefully and scrupulously omits to traverse any of the allegations of the appellant as to the exclusion of jurors because of race and color. The State of New York appears willing to risk its contention entirely upon the case made out by the appellant.

In short, this case, as to these questions of fact, stands upon all fours with the case of *Neal v. Delaware*. And upon the authority of that case it must be held here that the State of New York has denied to the appellant a right secured to him by the Constitution and laws of the United States.

III.

But it is said that the appellant should have raised this objection at the time of his trial.

To which we answer:

1.—There was no way in which he could make the objection. To show this, it will be necessary to consider somewhat in detail the provisions of the statutes of New York.

Practice in criminal actions and proceedings is regulated entirely by a code entitled The Code of Criminal Procedure of the State of New York, enacted in 1881.

By section 237 of this code it is provided that "a person held to "answer a charge for a crime may challenge an *individual* grand "juror."

It is clear that no challenge to an individual grand juror could raise the question which the appellant seeks to present to this court. His objection runs against the entire panel—not because any one or more jurors are disqualified, but because in drawing the panel a discrimination was made against his race. And this ground of objection could be made only by a challenge to the entire panel.

But section 238 expressly provides:

"*There is no challenge allowed to the panel or to the array of* "*the Grand Jury*, but the Court may, in its discretion, at any time "discharge the panel and order another to be summoned, for one or "more of the following reasons:

"1.—That the requisite number of ballots was not drawn from "the Grand Jury box of the county.

"2.—That notice of the drawing of the Grand Jury was not "given.

"3.—That the drawing was not had in the presence of the "officers designated by law; and

"4.—That the drawing was not had at least fourteen days before "the Court."

It is clear that under this section the appellant could not raise any question as to a discrimination against his race. And we shall demonstrate that no better opportunity was afforded him at any later stage of the case.

Section 273 of the Code provides that "All forms of pleading "heretofore existing are abolished; and hereafter the forms of "pleading, and the rules by which the sufficiency of pleadings is to "be determined, are those prescribed by this code."

The code then goes on to provide what an indictment shall contain, and how the defendant shall be arraigned to answer it. It is then provided as follows:

"§ 312.—In answer to the indictment, the defendant may either "move the court to set the same aside, or may demur or plead "thereto.

"§ 313.—The indictment must be set aside, by the court in which "the defendant is arraigned, and upon his motion, in either of the "following cases:

"1°.—When it is not found, indorsed and presented, as prescribed "in sections 268 and 272;

"2°.—When a person has been permitted to be present during the "session of the Grand Jury, while the charge embraced in the "indictment was under consideration, except as provided in Sections "262, 263 and 264.

"§ 316.—If the motion be denied, the defendant must immediately "answer the indictment, either by demurring or pleading thereto.

"§ 321.—The only pleading on the part of the defendant is either "a demurrer or a plea.

"§ 323.—The defendant may demur to the indictment, when it "appeared upon the face thereof,

"1.—That the Grand Jury, by which it was found, had no legal "authority to inquire into the crime charged, by reason of its not "being within the local jurisdiction of the county; or

"2.—That the indictment does not conform substantially to the "requirements of Sections 275 or 276; or

"3.—That more than one crime is charged in the indictment, "within the meaning of Sections 278 and 279; or

"4.—That the facts stated in the indictment do not constitute a "crime; or

"5.—That the indictment contains matter which, if true, would "constitute a legal justification or excuse for the acts charged, or "other legal bar to the prosecution.

"§ 332.—There are three kinds of pleas to an indictment; a plea of

"1.—Guilty;

"2.—Not guilty;

"3.—A former judgment of conviction or acquittal of the crime "charged; which may be pleaded either with or without the plea "of not guilty.

"§ 342.—If the defendant refuses to answer an indictment, by "demurrer or plea, a plea of not guilty must be entered."

These are all the sections having any bearing on the subject, and from them it is plain that the appellant was precluded from presenting his present objection to the constitution of the Grand Jury, by challenge, motion, demurrer or plea.

Indeed, the courts of New York have expressly decided that a defendant cannot avail himself of any violation of law in the formation of the Grand Jury.

People v. Dolan, 64 N. Y., 485.

We have now to show that the appellant was in no better case in respect to his objection to the constitution of the panel from which the petit jury was drawn.

It is unnecessary to quote the provisions relating to a challenge to a particular juror. They are found in Sections 374–377, and even if the present question could have been raised by a challenge to an individual juror, none of the grounds of challenge permitted would suffice to raise it.

The provisions concerning a challenge to the panel are as follows:

"§ 361.—A challenge to the panel is an objection made to all the "trial jurors returned for the term, and may be taken as well to "the panel returned for the term, as to an additional panel ordered "to complete the jury.

"§ 362.—A challenge to the panel can be founded only on a "material departure, to the prejudice of the defendant, from the "forms prescribed by the Code of Civil Procedure, in respect to the "drawing and return of the jury, or on the intentional omission of "the sheriff to summon one or more of the jurors drawn."

The provisions of the Code of Civil Procedure concerning trial jurors are found in Article First of Title IV of Chapter X of that code.

The qualifications of a trial juror in the City and County of New York, are defined by Section 1079. He must be:

"1.—A male citizen of the United States, and a resident of that "city and county.

"2.—Not less than twenty-one, nor more than seventy years of "age.

"3.—The owner, in his own right, of real or personal property of "the value of two hundred and fifty dollars, or the husband of a "woman who is the owner, in her own right, of real or personal "property of that value.

"4.—In the possession of his natural faculties, and not infirm or "decrepit.

"5.—Free from all legal exceptions; intelligent; of sound "mind and good character; and able to read and write the English "language understandingly."

Sections 1080–1089 relate to exemptions and excuses. By Section 1090 it is provided that "trial jurors must be selected by the com- "missioner of jurors, *who must alone decide upon their qualifications,*

"except as otherwise expressly provided in this article. But this "section does not impair the right to challenge a particular juror at "the trial."

Other provisions of the article give the courts power to excuse and discharge jurors in various cases. But no provision whatever is any where made for calling, as trial jurors, any persons whose names have not been put on the lists by the commissioner.

Section 1091 gives the commissioner power to appoint assistants.

Section 1092 provides:

"The president and commissioners of the department of taxes "and assessments, the police commissioners, and all other public "officers in the City of New York, must render to the commissioner "of jurors all the assistance in their power, to enable him to pro- "cure the names of persons liable to serve as trial jurors."

Sections 1094 and 1095 provide that the commissioner must commence the preparation of the lists of trial jurors in the month of May in each year, and after the first of June must give notice by publication that he will hear claims for exemption. He may require any person within the city to attend before him and testify concerning the liability of himself or another to serve as a trial juror.

By sections 1096 and 1097 the commissioner is required to deliver to the county clerk the lists of persons liable to serve as trial jurors, and the ballots containing their names, which ballots must be deposited in a box kept for that purpose.

It is from this box that the names of trial jurors are drawn. With the preparation of the lists and ballots, and the putting of the ballots in the box, the courts have nothing whatever to do. The law proceeds upon the theory that the jury box contains the names of all persons liable to serve as trial jurors.

Sections 1098–1106 contain "*the forms prescribed by the Code of Civil Procedure, in respect to the drawing and return of the jury*," and the summoning of the jury drawn. Those forms are, briefly, as follows:

The number of jurors required for any term of a court is fixed by the court by an order filed in the county clerk's office. The county clerk must then give six days' notice by publication of the drawing, and personal notice to the commissioner of jurors, the sheriff and at least three judges of courts of record. The drawing is done by the county clerk in presence of the commissioner, the sheriff, and at least one judge, in the following manner:

He must shake the box, so as to mix the ballots thoroughly. He must then publicly draw out the requisite number of ballots, one at a time, without seeing the name on any ballot, and the name on each ballot, as drawn, must be entered on a minute before drawing another ballot.

The minute must then be signed by the attending officer and filed in the county clerk's office. A copy must be delivered to the sheriff, and he must notify each juror drawn.

By a comparison of the foregoing provisions of the statute, it appears that the appellant had no opportunity to raise his present contention by a challenge to the panel. For such a challenge could raise no question except one affecting the manner of drawing the panel. And all the forms prescribed in respect to the drawing may have been strictly observed, and the appellant may nevertheless have suffered the injury of which he now complains.

In his petition, motion and affidavit he makes no complaint that jurors of his race were excluded by operation of law. Nor does he designate by name or title the officers by whom such exclusion was made, further than to describe them as the officers whose duty it was to select the names of persons to serve as jurors.

But it is clear that the officers who draw the panels from the general jury box cannot, in fact, discriminate against any person whose name is in the box. No one can, as a matter of fact, discriminate against any person eligible as a juror and exclude his name from the lists and ballots, except the Commissioner of Jurors and those officers whose duty it is to assist him in the preparation of the lists.

The allegations made by the appellant, therefore, must not be construed to mean that there was a discrimination against his race in the drawing of the panel from which his petit jury was drawn—which would have been a ground of challenge; they must be construed to mean that the discrimination was made in preparing the lists and ballots and putting them in the box from which the panel was drawn—and for this no challenge was allowed by the law of the State.

It was held in the case of *Neal v. Delaware* (*supra*) that the Fourteenth Amendment and the Act of 1875 operated as a repeal of provision in the Consitution and laws of a State inconsistent therewith. But it will hardly be contended that they can be taken

to supply a defect in the law of the State concerning a question of practice, even though that question may affect a substantial right. And we have demonstrated that the laws regulating the practice in the State court provided no means by which the appellant, before the petit jury was sworn, could present in that court the objection which he now presents here. Up to the time of trial he had no remedy in the State court. Whether he had a remedy after trial we shall see hereafter.

2.—The appellant did not waive his right by silence and a mere failure to assert it. For it was a constitutional right which he had no power to waive.

The Court of Appeals of New York has very clearly drawn the distinction between statutory and constitutional rights. Upon a trial for murder it was stipulated in writing signed by the defendant, his counsel and the District Attorney that a juror might leave the box and the trial go on with eleven jurors, but that the record might be made up so that the action should appear to have been tried by the twelve jurors originally sworn. The stipulation was filed and the juror was withdrawn.

A verdict against the defendant being rendered, he urged in arrest of judgment, that the verdict was rendered by eleven jurors only, and the Court of Appeals held on writ of error, that the objection was valid and available, notwithstanding the stipulation.

The Court rested the decision upon the ground that the constitution of a jury is determined by the fundamental law of the land, and that it cannot be altered, even by the express consent of a defendant. And they cite with approval the decision of the English judges, that a peer of the realm might not waive a trial by his peers and be tried by the country, "because the statute of Magna Charta "was in the negative, and the mode of trial was not so properly a "privilege of the nobility as part of the indispensable law of the "land."

Cancemi v. The People, 18 N. Y. 128.
Stephens v. Idem, 19 id. 551.
Willis v. Idem, 32 id. 715.

A trial by the country is a trial by jury, and the jury must be fairly drawn from the body of the county—the whole body of citizens liable to serve as jurors. If not so drawn it is not a jury of

the country. A casual or inadvertent omission of a comparatively small number of persons would be a matter of little consequence.

But the organic law does require that jurors shall be selected without regard to race or color, and if a discrimination is made and persons of a particular race excluded by reason of their race, such discrimination is a violation of the supreme law of the land. And when this appellant was put on trial before a jury drawn from a panel selected after such exclusion of citizens of his own race, his constitutional rights were invaded just as truly and substantially as if he had been tried by a jury of eleven or without a jury. And he had no more power to waive the injury in one case than in the other.

3.—Even if the State law had provided any means by which this question could be raised in the Court of General Sessions, and even if the appellant had the legal power to waive his rights, nevertheless, he is excused by his ignorance of his rights. And this ignorance extended to both law and facts.

a.—As to the law. It is stated in the petition that at the time of his arraignment, "he was then without counsel or any means of procur-"ing counsel; and was required and did plead to said indictment "in ignorance of his rights in the premises." And in the affidavit read upon the motion to set aside the judgment, it is alleged that at that time "he had no counsel, and was represented by none, and "that he was wholly without means to procure counsel, and that "the plea of not guilty was entered without an examination of said "indictment by counsel for deponent."

These allegations are entirely uncontradicted. We are not unmindful of the rule that every one is presumed to know the law. But a man is not always bound to rely upon such knowledge of the law as a layman may be presumed to have. When arraigned upon an indictment in a criminal action he is entitled to the benefit of counsel. This right is not only guaranteed to him by the organic law, but it is expressly made the duty of the court to see that he enjoys it. Section 308 of the Code of Criminal Procedure provides:

"If the defendant appear for arraignment without counsel, he "must be asked if he desires the aid of counsel, and if he does, the "court must assign counsel."

The plain inference from the record here is that this duty was

omitted by the court in this case, and if so it does not lie in the mouth of the State to charge the appellant with laches.

b.—As to the facts. It is expressly alleged in the petition that upon the trial the appellant was ignorant of the facts, without his fault; that he learned them after conviction, and thereupon proceeded immediately and with due diligence to move thereon in the Court of General Sessions.

We shall consider that motion presently. All that we now require is to relieve the appellant from the charge of laches, and that charge is answered by his uncontradicted averment that he was ignorant of the facts involved in his present contention, until after his conviction, and that as soon as they came to his knowledge he made application to the State court for relief.

In the case of *Neal* v. *Delaware*, the tender of proof and motion to summon witnesses was refused in the court below, upon the ground that full time to produce such witnesses to make such proof had existed before the motion was heard. But this Court said that in their judgment "the circumstances warranted more indulgence "in the matter of time, than was granted to a prisoner whose life "was at stake, and who was too poor to employ counsel of his own "selection."

The circumstances of this case require no less indulgence, if, indeed, any is required.

IV.

The Court of General Sessions was bound to entertain the appellant's motion to set aside the judgment, and to grant that motion, or at least to refrain from making any order to carry the judgment into effect.

Before discussing this question it will be convenient to refer briefly to some of the provisions of the Code of Criminal Procedure.

We have already seen that by this code the appellant was precluded from setting up his present contention, whether by challenge, motion, demurrer or plea, at any stage of the case prior to the swearing of the petit jury. It is not easy to see how the question could be raised during the trial; and the several sections relating to trial and verdict (§§ 388–454) throw no light upon the question.

Section 455 enumerates the cases in which a defendant may except to a decision of the court, and it does not seem that this question could have been raised by any exception.

A motion for a new trial, under Section 465, would have done no good, for the appellant's contention could not have been rested upon any of the seven grounds for a new trial enumerated in that section.

And it is held in New York that a court has no power to grant a new trial in a criminal action, unless such power is expressly given by statute.

Quimbo Appo v. People, 20 N. Y., 531.
Miller v. People, 32 N. Y., 719.

A motion to arrest judgment would have been equally unavailing, for by Section 467 that motion may be founded only upon defects appearing on the face of the indictment.

The former practice was otherwise, and in *Cancemi v. People* (*supra*) the question was raised by motion in arrest. But under the code on this motion only two objections are available: (1) "To "the jurisdiction of the court over the subject of the indictment;" (2) "That the facts stated do not constitute a crime."

People v. Buddensieck, 103 N. Y. 487.

It seems very clear, therefore, that according to the practice prescribed by the laws of New York the appellant had no opportunity to present his contention to the State court at any time prior to final judgment. The law of the State made no provision for the assertion of his rights under the laws of the United States.

It is alleged in the petition of the Attorney General that there was an appeal from this judgment, and affirmance of it by the Court of Appeals. This does not appear in the record here, and in strictness ought not to be considered.

It might, however, appear upon the return to the writs, if issued, and it may be worth while to note in passing that such an appeal and its determination could in no wise affect the question now before this court.

For since that question, according to the practice in the State court, could not be raised and in fact was not raised, it could not be, and was not, passed upon by the Court of Appeals; and when the judgment was affirmed and the record remitted to the Court of

General Sessions, that judgment, with respect to the question now raised, was in precisely the same condition as at the moment after it was rendered.

By Section 549 of the Code of Criminal Procedure, it is provided that after the remittitur has been sent down, "the appellate court "has no further jurisdiction of the appeal, or the proceeding there- "on; and all orders which may be necessary to carry the judgment "into effect must be made by the court to which the certificate is "remitted, or by any court to which the cause may thereafter be "removed."

It is very clear, therefore, that on the 31st day of October, 1890, when the appellant made his motion in the Court of General Sessions, that Court had jurisdiction of the judgment, of the subject mat er of the action, and of the person of the appellant.

And whether we are confined to the averment in the appellant's petition or consider the fuller account of the same thing given by the clerk of that court in his affidavit attached to the petition of the Attorney General, it is equally clear that the court had then arraigned the appellant before it for the purpose of making an order "necessary to carry the judgment into effect."

The judgment was illegal, because rendered upon a verdict returned by a jury impanelled in violation of law and upon an indictment illegally found. In *Cancemi v. The People* (*supra*), the objection was, that the defendant "was tried by a tribunal "unknown to the common law and the Constitution." In this case the objection is that the appellant was tried by a tribunal organized in violation of an express provision of the supreme law of the land, and upon a charge preferred by a body whose organization involved a similar violation of the same provision.

And the facts upon which the illegality of the judgment depended did not appear upon the face of the record, were not known to the appellant before the judgment, and when they became known they disclosed such an invasion of his constitutional rights as he had no power to waive.

When he was then arraigned at the bar, upon an application by The People, for an order to carry the judgment into effect, he clearly had no remedy under any law of the State. There is no provision in the Code of Civil Procedure or on any statute by which he could ask for any relief at that stage of the proceedings, upon the grounds involved in his present contention.

In this predicament, it is manifest that the appellant did all that he could to obtain relief against the injustice which had been wrought upon him. Disregarding the restrictions imposed by the provisions of the State laws, and asserting his rights under the supreme law, he made averment and tendered proof of the facts, and moved the court to stay its hand.

The motion was: "That the verdict of guilty heretofore rendered "be vacated and set aside, and that judgment upon such conviction "be stayed, and defendant granted a new trial."

And the prayer with which the affidavit read on the motion concludes is, "that said judgment and verdict herein be set aside, and "a further hearing be granted, and such proceedings had as may be "consistent with defendant's just rights."

This motion called in question the authority of the judgment—not in a collateral proceeding or in another court, but directly, in the same court in which the judgment was rendered, and in a proceeding in the same action upon an application for an order to carry the judgment into effect.

Substantial justice required that the appellant should have some remedy. If the State court had no power, under the laws regulating its practice, to vacate the judgment and set aside the verdict, at least it might have refrained from making any new order for carrying the judgment into effect.

It does not lie in the mouth of the State to contend here that the appellant had no remedy because the laws of the State prescribed no means by which his claim of a right under the supreme law might be heard and determined in the State court. It was the duty of the State to provide such means. If they were lacking, execution of the judgment should have been stayed until they could be supplied.

V.

The appellant is entitled to the relief prayed for in the Circuit Court of the United States.

The petition shows that the Court of General Sessions "refused "altogether to entertain his motion or to pass upon his said conten-"tion upon proofs so tendered, and a time was thereupon fixed for "putting him to death as aforesaid."

There is no provision of law by which that Court could be compelled to entertain the motion or to pass upon the contention, and there is no appeal from its refusal to any other court of the State.

Therefore if the rights of the appellant under the Constitution and laws of the United States can be enforced at all, they must be enforced by the courts of the United States.

1.—The appellant has no remedy by writ of error.

A writ of error to bring up the original judgment would evidently be of no avail.

Nor would such a writ lie to bring up the determination of the Court of General Sessions upon the motion made after judgment. For it does not appear that the motion was heard and decided. The court simply refused to entertain it. And even if there had been a legal adjudication upon it, such adjudication would not have been a final judgment which could be reached by writ of error.

2.—The appellant is entitiled to a writ of *habeas corpus*.

No complaint is made of the validity of the indictment upon its face, or of the competency and sufficiency of the evidence or of any decision of the court at the trial. We must, perforce, upon this application concede that all the proceedings, from the time when the jury was sworn to the time when sentence was pronounced were conducted according to law. We do not seek to review them or to use the writ of *habeas corpus* as a writ of error.

Our complaint attacks the jurisdiction of the tribunal by which the charge was made and the jurisdiction of the tribunal by which it was tried. We say not that they erred in their action, but that they had no jurisdiction to act, because they were organized in a manner expressly forbidden by the supreme law to which we appeal.

The lack of jurisdiction depends not upon a law of the State or of any judicial action of the Court in which the grand and petit juries were impanelled. It results from the act of a purely ministerial officer done long before this indictment was found.

And it must be observed that the commissioner of jurors, by excluding from the jury lists persons of African race, violated no law of the United States. Juries drawn from these lists were competent to indict and try any white man who was charged with crime.

The only consequence of his action was that during the period in

which jurors were drawn from the lists thus prepared the Court of General Sessions of the City and County of New York had no jurisdiction to indict and try a person of African race.

If that was the condition of affairs when this indictment was found and tried, then the Court was without jurisdiction and the judgment was absolutely void.

If the lack of jurisdiction depended upon a question of law, to be determined by a construction of statutes, there can be no doubt that the question might be raised on *habeas corpus*.

That it depends upon a question of fact makes no difference, for there is ample provision in the statutes of the United States for the hearing and determination of such questions on the return to the writ.

VI.

The writ is not to be refused because it appears that the petitioner would not be entitled immediately to be set at liberty.

The present custody is by the Agent and Warden of the State Prison in execution of the judgment. That imprisonment, we claim, is unlawful. But it appears from the petition, and would no doubt more fully appear on the return to the writs, that the petitioner is charged with the crime of murder. It would, therefore, be the duty of the Court to remand him to the custody of the proper officer, to be detained to answer an indictment by a Grand Jury having jurisdiction in the case.

VII.

The order appealed from should be reversed and the Circuit Court directed to issue the writs prayed for.

R. J. HAIRE,

Counsel for Appellant,

New York City, N. Y.

Office Supreme Court U. S.
FILED,
FEB 17 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

Brief for Agent and Warden.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

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JOSEPH WOOD.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

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IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

STATEMENT.

On or about the 12th day of March, 1890, at a Court of the General Sessions of the Peace held in and for the city and county of New York, the above-named appellant Joseph Wood was duly convicted of murder of one Charles Ruffin, and on the 28th day of March, 1890, judgment was duly entered on said conviction and the said Joseph Wood was sentenced to the punishment of death. He thereupon took an appeal to the Court of Appeals and on the 7th day of October, 1890, the said Court of Appeals handed down its decision affirming said judgment. A copy of the opinion of said court is annexed to the moving papers herein. (See page 8.) And on the 31st day of October, 1890, in pursuance of sections 503 and 504 of the Code of Civil Procedure of the State of New York, as amended by chapter 489 of the Laws of 1888, said Wood was brought before the court at which he was convicted and thereupon the said court did issue its warrant under the hand of the judge presiding commanding the agent and warden of Sing Sing prison to do execution of the sentence during the week commencing December 1, 1890. On the 28th of November, 1890, the said Wood presented to the Circuit Court for the Southern District of New York a petition for a writ of *habeas corpus*, which petition is annexed to the moving papers at pages 9 to 15. On the same day the said court made an order denying the prayer of the petition, and on the same day an appeal

was taken to the Supreme Court (see Exhibit C, page 16), and a citation issued. (See Exhibit D, page 16.)

The exact ground of the grievance presented by the petitioner is as follows: "That from the panels and lists of jurors whence said grand jury and petit jury were drawn, and from said juries all persons of African race and descent and black in color were excluded because and by reason of their said race, descent and color, and that in said city, county and State have always been excluded for a like reason." (See Exhibit "B," page 9.)

It clearly appears from the petition and from the affidavit of John Sparks, clerk of the said Court of General Sessions, that not until after the judgment of conviction of the said Wood had been affirmed by the Court of Appeals, and not until the 31st day of October, 1890, when he was brought before the said court for the purpose of having a new warrant issued as aforesaid "was any objection made by or on behalf of the appellant, either in the way of challenge or otherwise, to the absence or exclusion of persons of African descent and color from the grand jury by which said indictment was found, or from the panel from which said grand jury was selected, or from the petit jury by which said appellant was tried, or from the panel of talesmen from which said petit jury was selected." (See affidavit of Sparks, page 19.)

POINTS.

I.

THE ALLOWANCE OF THE WRIT OF HABEAS CORPUS WAS NOT A MATTER OF RIGHT, BUT RESTED TO A GREAT EXTENT IN THE DISCRETION OF THE COURT.

In Ex parte Milligan (4 Wall., 2), the court held, where the cause of imprisonment is fully shown by the petition, the court may without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

In re Hoover (30 Federal Reporter, 51), the District Court, Southern District of Georgia, Speer, Justice, held: "A clear, irreconcilable antagonism between the Federal law and the State law must be shown, to allow the writ."

In Ex parte Royall (108 U. S., 252, 253) the court said: "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it; * * * and the court is not deprived of discretion as to the time and mode in which it will exert the powers conferred upon it."

Ex parte Terry (128 U. S., 289, 301, 302) is to the same effect.

The latter case was decided subsequent to the passage of the act of March 3, 1885, chapter 353, 23 Statutes at Large, 437, amending section 764, Revised Statutes United States.

II.

There certainly can be made no claim by the appellant that since the adoption of the fourteenth amendment there has been anything in the action of the State of New York in the nature of legislation or by the holding of its courts by which there has been a denial of any right or immunity belonging to the appellant, or any discrimination in that regard in the selection of jurors because of race or color. (See section 1079 of the Code of Civil Procedure, and sections 1638 and 1641 of chapter 410 of the Laws of 1882, set out in the petition of the Attorney-General herein at pages 6 and 7; see, also, People v. King, 110 N. Y., 425.)

"The discrimination complained of does not result from the Constitution or laws of the State, as expounded by its highest judicial tribunal; and consequently it could not be made manifest until after the action of the State court in the case commenced. The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court under section 641." (Neal v. Delaware, 103 U. S., 393.)

III.

If the appellant had any reason to believe "that the officer authorized by the laws of the State of New York to select the names of, and the persons to serve as, grand jurors to serve for and in the Court of General Sessions of the Peace of the city and county of New York, selected no persons of the African race or of color, to serve as such jurors, but, on the contrary, excluded all persons of such race and color from those to serve as and be drawn

for jurors; * * * and drew from the list of those selected to serve as petit jurors, the petit jurors before whom the defendant was to be and was tried for his life under said indictment, and that from both the grand and petit jurors sitting in said court * * * all persons qualified by law to serve as jurors who were persons of the African race and color were excluded because of their race and color," etc., as set forth in his affidavit (see p. 15); it was his duty to have raised this objection at the time of his trial, and not wait until there had been a judgment of conviction and an affirmance thereof by the highest court of the State. It must be presumed that if this objection had been made at the proper time and place the court would have taken the proper course to have ascertained the truth of the objections made in the plea. If any wrong had been committed in that regard, then as was said by this court in Bush v. Kentucky (107 U. S. R., 119), reiterating what had been said in Virginia v. Rives, "the court will correct the wrong, will quash the indictment or the panel; or, if not, the error will be corrected in a superior court, and ultimately in this court upon review."

But in no case by proceeding in the manner in which this matter has been brought to the attention of the court can the writ of *habeas corpus* be converted into a writ of error, by which the judgment of the court of the State of New York passing the sentence can be reviewed by this court in the first instance. "If that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded his powers in the sentence which is pronounced, this court can inquire no further. * * * Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so, it is an error of law made by a court acting within its jurisdiction which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court." (Ex parte Yarbrough, 110 U. S., 651; In re Coy, 127 U. S., 759; Stevens v. Fuller, 136 U. S. R., 477.)

This court can "deal only with such defects in the proceedings as render them not simply erroneous or irregular, but absolutely void." (Ex parte Terry, 128 U. S., 306; see, also, Ex parte Harding, 120 U. S., 782; Ex parte Carll, 106 U. S. R., 521.)

IV.

This case being virtually in the possession and subject to the control of the court, and the court being in full possession of all the facts, there is no reason why a determination should not now be made dismissing the appeal herein in order that the laws of the State of New York may be properly administered and carried into effect. (See Ex parte Russell, 13 Wall., 671; Roberts v. Reilly, 116 U. S., 92.)

But in any event if the appeal herein cannot be dismissed or the order affirmed, the case should be advanced and the record printed and the same set down for argument at an early day as asked for in the petition herein.

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for the State of New York and for Augustus A. Brush, Warden of Sing Sing Prison.

Office Supreme Court U. S.
FILED.
APR 3 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
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Supreme Court of the United States,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1581.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

BRIEF FOR AGENT AND WARDEN.

Appeal from an order of the Circuit Court of the Southern District of New York made November 28th, 1890, denying petitioner's application for a writ of *habeas corpus* to the Agent and Warden of Sing Sing State Prison.

STATEMENT OF FACTS.

The petitioner was convicted March 12th, 1890, in the New York City Court of General Sessions, of the crime of murder, and sentenced to the punishment of death. He appealed to the Court of Appeals, which, on October 7th, 1890, affirmed the judgment of conviction; and on October 31st, he was brought before the court and an order made commanding the warden of Sing Sing Prison, in whose custody he was, to execute the sentence of death upon him during the week commencing December 1st, 1890.

When brought before the court at this time, he made a motion to set aside the verdict of guilty rendered at the trial, and stay the judgment of conviction and for a new trial, upon the ground that he was of the African race, and black in color, and that all persons of such race and color had been excluded from the grand jury which found the indictment against him, and from the panel of petit jurors from which the jury was selected to try him; and he alleged that persons of such race and color had always been excluded from the list and the drawings of both the grand and petit jurors in the

city and county of New York; and that there were many such persons qualified by law in all respects to serve as jurors residing in such city and county. He submitted with the motion an affidavit setting forth substantially the same allegations and requested the court to issue subpœnas directed to the commissioner of jurors of the city of New York, and to all other officers, clerks and persons known to the court to possess knowledge of the facts alleged in his affidavit, and whose evidence might enable him to establish such facts before the court passed upon his motion. The motion was denied, and the order above mentioned made.

November 28, 1890, his counsel applied to the Circuit Court for a writ of *habeas corpus*, setting forth in his petition substantially the same allegations as in his affidavit upon the motion to the General Sessions. The petition is signed and verified by counsel, who says it is true to his "knowledge, information and belief."

The following is a copy of the opinion of the Court of Appeals, upon the affirmance of the judgment of conviction:

"The record in this case discloses no exception that is not wholly frivolous. The counsel for the defendant frankly confessed that he had been unable to find an exception which he thought fit for argument; but he submitted the case in the hope that, in our examination of it, we might find some ground on which to base a reversal of the judgment. The case has been carefully examined because it involved human life; but we have been unable to find the slightest reason for disagreeing with the result arrived at in the trial court.

"By a mere filing of a notice of appeal from the judgment of conviction, the defendant has compelled the county of New York to print the whole record of his case, and it has been submitted to us by counsel in the hope that we might find that ground for reversing the judgment of conviction which he had been unable to discover. By this process, the defendant has also succeeded in having the execution of the sentence delayed several months with no good grounds existing therefor.

"Whether a criminal convicted of a capital crime should have it in his power, in all cases, to procure such delay in the execution of his sentence is a most serious question, and, as it seems to us, well worthy the careful consideration of the Legislature.

"The judgment should be affirmed.

"All concur." (123 N. Y., 632.)

POINTS.

I.

THE ALLOWANCE OF THE WRIT OF HABEAS CORPUS WAS NOT A MATTER OF RIGHT, BUT RESTED TO A GREAT EXTENT IN THE DISCRETION OF THE COURT.

In Ex parte Milligan (4 Wall., 2), the court held, where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

In re Hoover (30 Federal Reporter, 51), the District Court, Southern District of Georgia, Speer, J., held: "A clear, irreconcilable antagonism between the Federal law and the State law must be shown to allow the writ."

In Ex parte Royall (108 U. S., 252, 253), the court said: "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it; * * * and the court is not deprived of discretion as to the time and mode in which it will exert the powers conferred upon it."

Ex parte Terry (128 U. S., 289, 301, 302) is to the same effect.

The latter case was decided subsequent to the passage of the act of March 3, 1885, chapter 353, 23 Statutes at Large, 437, amending section 764, Revised Statutes, United States.

II.

THE LAWS OF NEW YORK MAKE NO DISCRIMINATION ON ACCOUNT OF RACE OR COLOR IN PRESCRIBING THE QUALIFICATION OF PERSONS TO SERVE AS JURORS IN THE COURTS OF THE STATE.

The following are the qualifications of trial jurors in the city and county of New York as prescribed by section 1079 of the Code of Civil Procedure:

"In order to be qualified to serve as a trial juror in a court in the city and county of New York a person must be:

"1. A male citizen of the United States, and a resident of that city and county.

"2. Not less than twenty-one, nor more than seventy years of age.

"3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value.

"4. In the possession of his natural faculties, and not infirm or decrepit.

"5. Free from all legal exceptions; intelligent, of sound mind and of good character; and able to read and write the English language understandingly."

By section 1081, there are fourteen classes of persons who are exempt from jury duty, although qualified to serve, providing they claim their exemption.

Section 1090 provides that trial jurors must be selected by the commissioner of jurors of the city and county.

Section 1638 of chapter 410 of the Laws of 1882, known as the New York City Consolidation Act, provides that the grand jurors shall be selected from the list of trial jurors by a board consisting of the mayor, the presiding judge of the Supreme Court, the chief justice of the Superior Court, the first judge of the Court of Common Pleas, the recorder and the city judge of the city.

Section 1641 requires that not less than six hundred nor more than a thousand shall be selected for one list of grand jurors, and that "the persons so selected shall be intelligent citizens of good character, and shall be, so far as the said board may be informed, possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and not exempted from serving as such jurors."

The petitioner, therefore, fails to bring his case within the rule laid down by this court in Strauder v. West Virginia (100 U. S., 303), or Bush v. Kentucky (107 U. S., 110).

In both of these cases the statutes of the State discriminated against colored persons in making up jury lists, and provided that none but white persons were qualified to serve as jurors.

In the latter case, the highest court of the State had declared the State law unconstitutional, and had decided that the officers charged with the duty of preparing lists of jurors should disregard it.

But this decision was not made until after the grand jury had been selected which found the indictment in that case; and hence, it was to be presumed that the State officers observed the requirements of the statute in the preparation of the list of grand jurors.

The question in both cases came up on an application to remove the causes into the Federal courts under section 641, Revised Statutes. The present case is within the principle enunciated in Virginia v. Rives (100 U. S., 313), where the statutes of the State make no discrimination on account of race or color.

III.

THE ALLEGATIONS OF THE PETITION ARE INSUFFICIENT TO SHOW THAT THERE HAS, IN FACT, BEEN ANY DISCRIMINATION MADE BY THE AUTHORITIES OF THE CITY AND COUNTY OF NEW YORK IN THE PREPARATION OF THE LISTS OF TRIAL AND GRAND JURORS AGAINST PERSONS OF COLOR OF THE AFRICAN RACE, ON ACCOUNT OF SUCH RACE AND COLOR.

No facts are given; there is nothing but the naked unsupported allegation of the petitioner, that from the lists of grand and petit juries in the city and county of New York all persons of African race and descent, and black in color, were, and always have been excluded because of their race, descent and color.

The petition is not sworn to by the petitioner or by any person shown to have knowledge of the facts.

It is not even directly alleged that such exclusion has been caused by the action of the public officers who make up the jury lists or that it was intentional on their part.

It may, perhaps, be so inferred from the statements which are made; but it is submitted that a grave charge of this character should not be left to implication or inference.

The Constitution of the United States, as construed by this court, prohibited any such discrimination, and the legal presumption is that the officers of the State did their duty and respected the mandate of the Federal Constitution.

This presumption, always strong and requiring the clearest proof to overcome it, was a part of the evidence upon which the Circuit Court was required to act when the petitioner's application was presented to it.

When it is to be considered that, in order to grant the writ, the court was required to find that it sufficiently appeared that the commissioner of jurors of the city and county of New York had not only in a single instance, but persistently, violated his constitutional oath of office, and that the mayor of the city, the presiding judge of the Supreme Court, the chief justice of the Superior Court, the first judge of the Court of Common Pleas, the recorder, and the city judge of the city had each violated his constitutional oath of office, not once, but many times, it is not surprising that the Circuit Court reached the conclusion that the petitioner upon his own showing was not entitled to the writ.

The court also had the right to take judicial notice of the fact that the colored population of the city of New York was but a small percentage of the entire population of the city, and their absence from the jury lists, if true, might very properly be ascribed to other causes than an unlawful and unjust discrimination.

The census of 1880 showed that all the colored people in the city constituted but one and six-tenths per cent of its population. It is announced that the increase in their number during the past ten years has not kept pace with the increase of the white population; and it is safe to assume that when the petitioner's trial took place the percentage was even less.

Such a small percentage might easily fail of representation upon the jury lists from causes other than discrimination, on account of race or color.

The law does not require all persons qualified to serve as jurors to be placed on the jury lists.

There are various qualifications, among them an educational and property qualification, and fourteen classes of exempt persons; and it is much more reasonable to ascribe the failure of this small fraction of the population to appear on the jury lists to other causes than to impute it to a willful and criminal neglect of duty on the part of public officers of high standing and of unquestioned integrity.

IV.

IF ALL THE ALLEGATIONS OF THE PETITIONER WERE TRUE, THEY WOULD AFFORD NO GROUNDS FOR THE ISSUANCE OF A WRIT OF HABEAS CORPUS.

The objection which the petitioner made, when brought into court for the purpose of having the period of time fixed, within which he should be executed, was one for the consideration and decision of the trial court in the first instance; and if its decision was erroneous and involved the question of a violation of the Federal laws or Constitution, it can only be reviewed and corrected in this court by writ of error.

The State court had jurisdiction of the petitioner and of the offense for which he was tried; and in such cases the writ of *habeas corpus* cannot be made to answer the purpose of a writ of error.

Ex parte Parks, 93 U. S., 18.
Ex parte Yarborough, 110 U. S., 651.
Ex parte Bigelow, 113 U. S., 328.
In re Coy, 127 U. S., 759.
In re Lane, 135 U. S., 443.
Stevens v. Fuller, 136 U. S., 468.
In re Grimley, 137 U. S., 147.
In re Lancaster, 137 U. S., 393.

The petitioner does not allege in his petition that the decision of the General Sessions, of which he complains, was not reviewable in the State courts or by writ of error to this court.

The petition does not, upon its face, show any reason why resort for the correction of the alleged error must be had to the extraordinary remedy by writ of *habeas corpus*.

There were several ways in which the petitioner might have presented his objection to the State court and to this tribunal:

First. Upon the trial, by a challenge to the panel of trial jurors.

Section 359, Code of Criminal Procedure, provides for a challenge to the panel.

Section 361: "A challenge to the panel is an objection to all the trial jurors returned."

Section 517: "An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment,

except that when the judgment is of death, the appeal must be taken direct to the Court of Appeals; and upon the appeal any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section 485, may be reviewed."

Subdivision 3 of section 485 provides that the judgment-roll on appeal shall contain "a copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict and the proceedings and decision thereon."

Second. By motion in arrest of judgment if the petitioner had caused his challenge to the panel and the grounds thereof, and the proofs in support of it to be entered upon the records of his trial.

Section 467 provides that "a motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section 331."

This last clause is permissive, but not exclusive, and provides that certain defects in the indictment, which, otherwise, must be demurred to, might be made available upon a motion in arrest of judgment.

But all the other grounds upon which such motion might be made previously to the adoption of the Code are still available; and they include every reason appearing upon the record of the trial why no judgment should be rendered against the defendant.

People v. McRay, 8 Johns., 212.
People v. Bruno, 6 Park. 657.
Jacobowsky v. People, 6 Hun, 524; 64 N. Y., 659.

Subdivision 6 of section 485 provides that the judgment on appeal shall contain "A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment."

Third. By motion for a new trial, if, as he alleges, he had no knowledge of the existence of the facts at the time of the trial.

Section 465, subdivision 7, provides that the court may grant a new trial after verdict "when it is made to appear by affidavit that upon

another trial the defendant can produce evidence such as if before received would probably have changed the verdict, if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence."

As we have seen subdivision 6 of section 485, requires the judgment-roll on appeal to contain a copy of the minutes of any proceedings upon a motion for a new trial.

Fourth. By a direct review of the decision of the General Sessions when the petitioner was brought before that court for the purpose of having the time fixed within which the sentence of death should be executed.

It is unnecessary to discuss the question whether there was any appeal to the State courts from the decision and order made by the court at that time.

If such appeal might be taken, the petitioner had no right to a writ of *habeas corpus.*

But assuming, for the purposes of this argument, that there was no appeal in the State courts allowed, then the petitioner might have had a writ of error from this court to the General Sessions to bring the record here for review if any Federal question was involved.

It has been repeatedly held that where the decision of the State court is final, the writ will issue directly to that court, although it is not the highest court of the State.

Downham v. Alexandria, 9 Wall., 661.
Gregory v. McVeigh, 23 Wall., 294.
Windsor v. McVeigh, 93 U. S., 274.

The Code of Criminal Procedure expressly conferred upon the Sessions the jurisdiction to inquire into the circumstances and ascertain and determine whether any legal reason existed why the sentence of death should not be executed. (Sec. 504.)

The counsel for the petitioner so understood it, for he appeared and showed, or undertook to show, the facts upon which he relies to secure a writ of *habeas corpus;* and what he now complains of is that the court erroneously decided that no legal reason existed why the sentence should not be executed.

It is submitted that if the petitioner was aggrieved by this decision, he has mistaken his remedy.

The case of Neal v. Delaware (103 U. S., 370), is directly in point. It was there held that if citizens of African descent were intentionally excluded, because of their race and color, from the lists from which the grand jury that found the indictment and the petit jury, by which it was tried, were made up, it was a violation of the prisoner's rights under the Constitution and laws of the United States, which the trial court was bound to redress; and that the remedy for any failure in that respect was ultimately in this court upon writ of error.

V.

The order appealed from should be affirmed; and in order that the execution of the judgment of conviction may not be further unnecessarily delayed, it is respectfully requested that a direction be given that the mandate be immediately sent to the court below.

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for Warden and for the People.

I. H. MAYNARD, *Dep. Att'y-Gen'l,*
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

Petition and Notice to Dismiss Appeal or Advance Case.

CHARLES W. [illegible]

[illegible]

The case of Neal v. Delaware (103 U. S., 370), is directly in point. It was there held that if citizens of African descent were intentionally excluded, because of their race and color, from the lists from which the grand jury that found the indictment and the petit jury, by which it was tried, were made up, it was a violation of the prisoner's rights under the Constitution and laws of the United States, which the trial court was bound to redress; and that the remedy for any failure in that respect was ultimately in this court upon writ of error.

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The order appealed from should be affirmed; and in order that the execution of the judgment of conviction may not be further unnecessarily delayed, it is respectfully requested that a direction be given that the mandate be immediately sent to the court below.

CHARLES F. TABOR, *Att'y-Gen'l.*
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Of Counsel.

Office Supreme Court U. S.
FILED
FEB 16 1891
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

Petition and Notice to Dismiss, Affirm or Advance Case.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD.

Petition and Notice to Dismiss, Affirm or Advance Case.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL
OF
JOSEPH WOOD.

To the Supreme Court of the United States:

The petition of Charles F. Tabor respectfully shows: That he is Attorney-General of the State of New York, and as such is attorney 1
for A. A. Brush, Agent and Warden of State Prison at Sing Sing, New York, and he is also attorney for the People of the State of New York in all matters in which said People have any interest.

Your petitioner further shows, upon information and belief, that on or about the 12th day of March, 1890, at a Court of General Sessions of the Peace, duly held in and for the city and county of New York, the above-named Joseph Wood was duly convicted of murder in the first degree, of one Charles Ruffin, and that thereafter and on the 28th day of March, 1890, judgment was duly given and entered on said conviction in said court, and the said Joseph Wood, by and in pursuance of said judgment, was, thereupon, duly sentenced to the punishment of death. 2

Your petitioner further alleges, upon information and belief, that thereafter the counsel for the said Joseph Wood, being duly authorized in that behalf, did duly appeal from said judgment of conviction to the Court of Appeals of the State of New York, and that such proceedings were thereafter had on such appeal that on or about the 7th day of October, 1890, the said Court of Appeals handed down and announced its decision upon said appeal, in and by which the said judgment of conviction of said Joseph Wood was, in all things, affirmed, and that a copy of the opinion of the said court, made upon the disposition of said appeal, is hereto annexed, marked "A." 3

And your petitioner further shows that afterwards, on October 15, 1890, the judgment of the Court of Appeals was made the judgment of the Court of General Sessions of the Peace, and on

or about the 31st day of October, 1890, the said defendant, Joseph Wood, in pursuance of sections 503 and 504 of the Code of
4 Criminal Procedure of the State of New York, as amended by chapter 489, Laws of 1888, was duly brought before the said court at which he was convicted, and that thereupon the said court did duly issue its warrant to the agent and warden of the State prison mentioned in the original warrant and sentence, which warrant was under the hand of the judge presiding at the said court, and which warrant duly commanded the said agent and warden to do execution of the sentence upon the said Joseph Wood, during the week commencing December 1, 1890.

Your petitioner further shows, upon information and belief, that on or about the 28th day of November, 1890, the said Joseph
5 Wood, by one Robert J. Haire, presented to the Circuit Court of the United States for the Southern District of New York, a petition, dated November 28, 1890, a copy of which is hereto annexed, marked Exhibit "B," praying that the said court forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, Agent and Warden of Sing Sing Prison, requiring him to produce the body of said Joseph Wood before said court at some time to be designated in said writ, there to abide what should be awarded by said court in the premises. And the said petitioner did also pray that a writ of *certiorari* issue to said Court of General Sessions of
6 the Peace, and the clerk thereof, commanding it or him forthwith to certify to the said Circuit Court of the United States true copies of the list of grand jurors for the October term of 1889 of said court, of lists and panels of trial jurors or additional trial jurors for the March term, 1890, of said court, and of the indictment, record, orders and warrants and commitments of said courts remaining under and by virtue of which the said Joseph Wood was claimed to be deprived of his liberty by authority of that court.

That afterwards such proceedings were had that on the said 28th day of November, 1890, the said Circuit Court duly made an order therein denying the prayer of said petitioner in all things.

7 Your petitioner further alleges, upon information and belief, that afterwards and on the same day the said Robert J. Haire did take an appeal from said order to this court, which appeal in form was allowed by Addison Brown, District Judge, then holding a Circuit

Court, and a copy of which appeal and allowance is hereto annexed, marked "C."

That afterwards, and on or about the 29th day of November, 8
said Addison Brown, District Judge, did issue his citation to the said Augustus A. Brush, agent and warden as aforesaid, returnable on the first Monday of January, 1891, and a copy of which citation is hereto annexed, marked "D."

Your petitioner further shows, upon information and belief, that none of the objections and grievances set forth in the said petition asking for said writ of *habeas corpus* were ever in fact presented to any State court, and particularly to the court before which the said Joseph Wood was convicted of murder as aforesaid, until after the trial, conviction and sentence of said Wood, and after the the decision of the Court of Appeals affirming said judgment of conviction; 9
but that, in truth and in fact, all the objections in that behalf made were only presented to the said court at the time the said Joseph Wood was brought before the General Sessions in pursuance of and in obedience to the provisions of said sections 503 and 504 of the Code of Criminal Procedure, all of which appears by the affidavit of John Sparks, Clerk of the General Sessions of the Peace, hereto annexed and marked "E," reference being had thereto.

And your petitioner further shows, upon information and belief, that no appeal has been taken by said Wood, or by anyone in his behalf, from the determination and action of said court of General 10
Sessions of the Peace overruling the objections so as aforesaid made in behalf of said Joseph Wood to any State court, or has the said Wood in any way attempted to review the said action and determination of the said Court of General Sessions, except by and through the said application for a writ of *habeas corpus*.

Your petitioner further shows, upon information and belief, that there are now under conviction and sentence of death in the State prisons of New York at least nine convicts.

Your petitioner further alleges, on information and belief, that there is no merit in this appeal, and that the same was taken for delay only; and that the said petition for a writ of *habeas corpus* 11
shows no grounds for the granting of the same, and that no facts are stated in said petition to show that the said Joseph Wood is restrained of his liberty in violation of the Constitution, or of any

law or treaty of the United States, or that he is entitled to said writ upon any other ground mentioned in the laws of the United States.

12 And your petitioner further shows that there is not now, and that there has not been, within the last fifty years, any law, statute or Constitution in the State of New York making any discrimination against the color or race of a person who shall be otherwise qualified to serve or act as trial juror or grand juror in the courts of said State. That section 1079 of the Code of Civil Procedure of the State of New York (to which reference is hereby had) provides what shall be the qualifications of trial jurors in the city and county of New York. That said section is in the words and figures following, to wit:

13 "Qualifications of trial jurors.— In order to be qualified to serve, as a trial juror, in a court in the city and county of New York, a person must be:

"1. A male citizen of the United States, and resident of that city and county.

"2. Not less than twenty-one or more than seventy years of age.

"3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value.

14 "4. In the possession of his natural faculties, and not infirm or decrepit.

"5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly."

And that section 1090 of said Code provides that trial jurors must be selected by the commissioner of jurors of the city and county of New York.

That section 1638 of chapter 410 of the Laws of 1882, being what is commonly known as the Consolidation Act, provides as follows:

"The persons to serve as grand jurors at Courts of Oyer and Terminer
15 and General Sessions, to be held in the city of New York, shall be selected from the persons whose names are contained in the lists of petit jurors for the time being for said city, by a board to consist of the mayor of such city, the presiding judge of the Supreme Court in the first judicial district, the chief justice of the Superior Court

of the city of New York, the first judge of the Court of Common Pleas, the recorder, and the city judge of said city and county."

And that section 1641 of said act, which prescribes the qualifications of grand jurors, is in the words and figures following: 16

"The said board shall, within fifteen days after the first meeting, select from the list produced by the commissioner of jurors of persons qualified to serve as jurors in said city a list of the names of not less than six hundred nor more than one thousand persons to serve as grand jurors of the different Courts of Oyer and Terminer and General Sessions, to be held in said city until the next list shall be prepared, and the names thereon deposited as hereinafter mentioned. The persons so selected shall be intelligent citizens, of good character, and shall be, so far as the said board may be informed, possessed of the qualifications by law required of persons 17 to serve as jurors for the trial of issues of fact, and not exempted from serving as such jurors."

Your petitioner further shows, upon information and belief, that the said appeal herein has been docketed, but the record thereof has not been printed, and that the number thereof upon said docket is 1581. And that in the furtherance of the administration and execution of the criminal laws of the State of New York, it is eminently proper that the said order appealed from be affirmed, or the appeal herein be dismissed upon the ground that the same was taken for delay only, and that the question on which the 18 jurisdiction of this court depends is so frivolous as to not need further argument; but in case this court should determine that the same ought to be held for argument, then that the same be set down for such early day as to the court may seem meet and proper.

Wherefore your petitioner now prays that upon this petition and the accompanying papers, and upon the inspection of the record filed herein, that the said appeal be dismissed; or that the said order of the Circuit Court refusing to grant said writ of *habeas corpus* be affirmed; or that the said appeal be advanced and set down for argument for as early a day as to the court seem meet and 19 proper. And your petitioner will ever pray.

Dated ALBANY, *February* 6, 1891.

CHARLES F. TABOR.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
City and County of Albany, } *ss.:*

20 Charles F. Tabor, being duly sworn, says, that I am the petitioner named in the foregoing petition; that I have read the same and know the contents thereof, and that the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHARLES F. TABOR.

Sworn to before me,
February 10, 1891.

WALTER L. CHILDS,
21 *Notary Public, Albany Co., N. Y.*

"A."

COURT OF APPEALS.

THE PEOPLE, RESPONDENT,

vs.

JOSEPH WOOD, APPELLANT.

22 *October* 7, 1890.

Robert J. Haire, for appellant.

McKenzie Semple, for respondent.

PER CURIAM. The record in this case discloses no exception that is not wholly frivolous. The counsel for the defendant frankly confessed that he had been unable to find an exception which he thought fit for argument, but he submitted the case in the hope that in our examination of it we might find some ground upon which to base a reversal of the judgment. The case has been carefully examined because it involved human life, but we have been
23 unable to find the slightest reason for disagreeing with the result arrived at in the trial court.

By a mere filing of a notice of appeal from the judgment of conviction, the defendant has compelled the county of New York to print the whole record of his case, and it has been submitted to

us by counsel in the hope that we might find that ground for reversing the judgment of conviction which he had been unable to discover. By this process the defendant has also succeeded in having the execution of the sentence delayed several months with no good ground existing therefor.

Whether a criminal convicted of a capital crime should have it in his power in all cases to procure such delay in the execution of his sentence is a most serious question, and, as it seems to us, well worthy the careful consideration of the legislature.

The judgment should be affirmed.

All concur.

(A copy.) H. E. SICKELS,
Reporter, per C.

"B."

To the Judges of the Circuit Court of the United States for the Southern District of New York:

The petition of Joseph Wood respectfully shows:

First. That he is a citizen of the United States, of African race and descent, and black in color, and that he is deprived of his liberty by Augustus A. Brush, Agent and Warden of Sing Sing Prison, in the Southern District of New York, who threatens to put him to death in the week beginning December 1, 1890, and that he is thus held in custody and deprived of his liberty against his will and in violation of the Constitution of the United States.

Second. The facts concerning the detention, and the claim or authority by virtue of which he is so detained, are as follows: He was convicted of the crime of murder in the first degree, in the Court of General Sessions of the Peace, in and for the City and County of New York, on the 10th day of March, 1890, and sentenced upon such conviction to death, under chapter 489 of the Laws of 1888, and committed to the custody of said Brush accordingly.

That the indictment upon which he was so arraigned was found by a grand jury at the October Term, 1889, of said court, and he was convicted by a petit jury at the March Term, 1890.

That from the panels and lists of jurors whence said grand jury and petit jury were drawn, and from said juries all persons of

African race and descent, and black in color, were excluded because and by reason of their said race, descent and color, and that in said
28 city, county and State have always been excluded for a like reason. That he was arraigned to plead to said indictment upon the 28th day of October, 1889, and was then without counsel, or any means of procuring counsel; and was required and did plead to said indictment in ignorance of his rights in the premises.

That upon the trial of said indictment he was ignorant of the facts aforesaid, without his fault, and was, therefore, unable to challenge or otherwise object to the lists, panels and array of grand and petit jurors for the ground aforesaid.

After his conviction aforesaid he learned the facts aforesaid in relation to the exclusion of such persons, and thereupon immediately,
29 and with due and ordinary diligence, according to the practice of said court, he duly moved therein, upon due allegation and tender of proof of the facts aforesaid, for a new trial, a copy of his said motion and of the affidavit in support thereof is hereto annexed, marked exhibit "A," and made part of this petition. And according to law and the practice of said court such motion should have been entertained and decided upon its merits, upon due consideration of the allegations and proof aforesaid, and upon due proof should have been granted. But the said court refused altogether to entertain his said motion or to pass upon his said contention upon
30 proofs so tendered, and a time was thereupon fixed for putting him to death as aforesaid.

Whereby he has been deprived of all the privileges and just rights of citizens of the United States and of the equal protection of the laws, and is in like manner deprived of his liberty and about to be deprived of his life without due process of law.

Your petitioner therefore alleges that the commitment aforesaid and the detention under the conviction and sentence aforesaid and under said indictment, are null and void, and of no force of validity, and prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, agent and
31 warden as aforesaid, requiring him to procure the body of said Joseph Wood before this court, at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises. And at the same time he prays your honors to issue out of said court the writ of *certiorari* to the said court

of General Sessions of the Peace and the clerk thereof, commanding it or him forthwith to certify to said Circuit Court of the United States true copies of the lists of grand jurors for the October Term, 1889, of said court of lists and panels of trial jurors or additional trial jurors for the March Term, 1890, of said court and of the indictment, record, orders and warrants and commitments in said court remaining under and by virtue of which said Joseph Wood is now deprived of his liberty by authority of that court. 32

JOSEPH WOOD.

By R. J. HAIRE. 33

CITY AND COUNTY OF NEW YORK, *ss.:*

Robert J. Haire, being duly sworn, says: I am counsel for said Joseph Wood, the petitioner herein, and am duly authorized by him to make, subscribe, certify and present the foregoing petition. I have read the same and know its contents. It is true to my knowledge, information and belief. The reason it is not verified by him is that he is in close confinement at Sing Sing prison, and 34 the week fixed for his execution begins on Sunday next, and there is not time, therefore, to have him verify it and serve the writ without endangering his life.

ROBERT J. HAIRE.

Sworn to before me this 28th day of November, 1890.

GEORGE W. HOOPER,
Notary Public, Suffolk Co. 35

Certificate filed in New York county.

"A."

36 THE PEOPLE, ETC.,

against

JOSEPH WOOD.

MURDER.

Copy of motion and affidavit on motion for new trial and stay at time of sentence:

THE COURT OF GENERAL SESSIONS OF THE PEACE
IN AND FOR THE CITY AND COUNTY OF NEW YORK.

37 THE PEOPLE, ETC.,

against

JOSEPH WOOD.

MURDER.

The defendant in the above-entitled cause, by his attorney, R. J. Haire, moves this court: That the verdict of guilty heretofore rendered be vacated and set aside and that judgment upon such conviction be stayed, and defendant granted a new trial upon the following grounds:

38 *First.* That the defendant is of the African race, and black in color, and that all persons of this race and color were excluded in the drawing of the panel of the petit jurors, from which the trial jury herein was selected.

Second. That by reason of such exclusion the defendant was denied the equal protection of the laws, and did not have the full and equal benefit thereof in the proceedings for the security of his life and liberty, as is enjoyed by white persons, and to which he is and was justly entitled.

Third. That all persons of the African race, and of color, were 39 excluded from the grand jury, by which the indictment against the defendant was found, and upon which he was tried; and consequently said indictment was illegal and void, and the defendant ought not to have been put upon trial upon said indictment, as said trial court was without jurisdiction.

Fourth. That persons of the African race and color have always been excluded from the list and drawings of both the grand and petit jurors, in and for the city and county of New York, though there were, and, for many years last past, have been, many such persons qualified by law, in all respects, to sit as grand and petit jurors in this court, and residing in the said city and county of New York.

Fifth. That the honorable recorder who, presiding at the trial as a member of the board who selected the grand jury by which defendant was indicted, had judicial knowledge and notice of the exclusion of persons of said African race and color, and should have advised the defendant of such fact when called upon to plead, as defendant was without counsel and unable to procure the same.

Sixth. That the honorable recorder, sitting as trial judge, had judicial knowledge and should have taken judicial notice of the fact of the exclusion, in manner aforesaid, of persons of the African race and color from the panel of petit jurors, in attendance at the term of court, from which the jury in defendant's case was selected.

Seventh. That the entire proceedings herein were contrary to the just rights and interests of the defendant, and not in accordance with the guaranteed rights of defendant. This motion is based upon the affidavit of the defendant, herewith filed, all proceedings in said cause, and the request to subpœna and examine witnesses concerning the material allegations in the affidavit of said Wood contained.

Dated *October* 31, 1890.

R. J. HAIRE, *Atty. for Defendant,*
23 *Chambers St., New York City.*

"And now before your honor rules this motion, I desire it to appear of record that the defendant further moves the court and demands that subpœnas be issued, directed to the commissioners of jurors of the city of New York, and to all other officers, clerks and persons who are known to the court to possess personal knowledge of the facts relating to these matters alleged in the affidavit of defendant, at this time filed, and whose testimony may enable defendant to establish the facts in said affidavit set forth, and that

said commissioners and others be examined and their evidence taken in support of this motion, and before the court passes upon the
44 same."

R. J. HAIRE,
Atty. for Defendant.

NOTE. — The foregoing motion was made, denied and exceptions taken, before sentence was pronounced.

See Del. against Neal, 103 U. S. Reports, page 370.

R. J. HAIRE.

COURT OF GENERAL SESSIONS OF THE PEACE

IN AND FOR THE CITY AND COUNTY OF NEW YORK.

45

THE PEOPLE, ETC.,

against

JOSEPH WOOD.

MURDER.

CITY AND COUNTY OF NEW YORK, *ss.:*

Joseph Wood, being duly sworn, deposes and says: That he is the defendant in the above-entitled cause, and was heretofore con-
46 victed of the crime of murder in the first degree, upon an indictment found by the grand jury of the city and county of New York on the day of 1889, and that he, deponent, was arraigned and plead to said indictment on the day of 1889, and that at the time he was so arraigned he had no counsel, and was represented by none, and that he was wholly without means to procure counsel, and that the plea of "not guilty" was entered without an examination of said indictment by counsel for deponent.

Deponent further says, that he is a citizen of the United States, and was born in the State of Virginia, and that he is of African race and descent, and black in color.

47 Deponent further says, that there are at least several thousand citizens of the African race and descent, and black in color, who, are and were, and for more than ten years last past, residents of the city and county and State of New York, and who are qualified in all respects to sit as grand and petit jurors in the court wherein this

deponent was heretofore tried, convicted and sentenced to death; that the officers authorized by the laws of the State of New York to select the names of and the persons to serve as grand jurors, to 48
serve for and in the Court of General Sessions of the Peace of the City and County of New York, selected no persons of the African race, or of color, to serve as such jurors, but, on the contrary, excluded all persons of such race and color from those to serve as and be drawn for jurors; that said officers in and for said city and county of New York drew from the list of those so selected to serve as grand jurors the grand jurors by whom the indictment against the defendant was found, and drew from the list of those selected to serve as petit jurors the petit jurors before whom the defendant was to be and was tried for his life under said indictment; and that from both the grand and petit juries sitting in said 49
court, by whom the deponent was indicted and tried, all persons qualified by law to serve as jurors who were persons of the African race and color were excluded because of their race and color, and that not one person of said African race and color was drawn or summoned, but that said grand and petit juries were composed exclusively of white persons, and that, in fact all persons, deponent is informed and believes, of the African race, although qualified to serve as jurors, have always in said city, county and State, been excluded from service upon juries because of their race and color, and that by reason of such exclusion the said juries have been com- 50
posed wholly of the white race, and the defendant, in the finding of the said indictment and the trial thereupon, was denied the equal protection of the laws, and did not have the full and equal benefit of all laws and proceedings, in the said State of New York, for the security of his person as is enjoyed by white persons.

Deponent asks that said judgment and verdict herein be set aside, and a further hearing be granted, and such proceedings had as may be consistent with defendant's just rights.

JOSEPH WOOD.

Subscribed and sworn to before me, this 31st day of October, 1890. 51

N. S. Levy,
Notary Public, New York City.

"C."

IN THE CIRCUIT COURT OF THE UNITED STATES,
52 FOR THE SOUTHERN DISTRICT OF NEW YORK.

EX PARTE JOSEPH WOOD.

The petitioner, in behalf of Joseph Wood, conceiving himself aggrieved by the final decision of this court declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record herein may be sent to the said Supreme Court.

R. J. HAIRE,
53 *Attorney for Petitioner.*

Dated NEW YORK, *November* 28, 1890.

The foregoing appeal is hereby allowed and the clerk of this court is hereby directed to send to the Supreme Court of the United States forthwith a transcript of the petition, decision, order thereupon, and of this appeal.

Dated NEW YORK, *November* 28, 1890.

(Signed.) ADDISON BROWN,
District Judge.

54 A copy.

JOHN A. SHIELDS,
Clerk.

"D."

BY THE HONORABLE ADDISON BROWN, ONE OF THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

UNITED STATES OF AMERICA, *ss.:*

55 *The President of the United States to Augustus A. Brush, Esq., Agent and Warden of Sing Sing Prison, in the State of New York,* GREETING:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at

the city of Washington, on the first Monday of January next, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Joseph Wood is appellant, and said Augustus A. Brush, as Agent and Warden, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf. 56

Given under my hand at the city of New York in the Southern District of New York in the second circuit, on the twenty-ninth day of November, in the year of [L. S.] our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fifteenth.

ADDISON BROWN, 57

District Judge.

R. J. HAIRE,
Attorney for Appellant, 23 *Chambers St.*

"E."

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL

OF

JOSEPH WOOD. 58

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.:*

John Sparks, being duly sworn on oath, deposes and says that he is now and at all time hereinafter mentioned, was the clerk of the Court of General Sessions of the Peace in and for the city and county of New York, and likewise clerk of the Court of Oyer and Terminer in and for the city and county of New York.

Deponent further says that at a term of the said Court of General Sessions of the Peace, begun and holden at the City Hall, in the said city of New York, on the 1st Monday of October, 1889, 59 to wit, on the 25th day of October, 1889, an indictment was duly found and presented by the grand jury of the city and county of New York against the said appellant Joseph Wood, accusing him of the crime of murder in the first degree of one Charles Ruffin,

committed on the 19th day of May, 1889; that thereafter at a term of said Court of General Sessions of the Peace in and for the
60 city and county of New York, held at the City Hall in said city of New York, on the 12th day of March, 1890, before the Hon. Frederick Smyth, recorder of the said city of New York, and presiding justice of the said court, the said appellant was convicted by the verdict of a jury of the crime of murder, in the first degree, of one Charles Ruffin, as by said indictment was charged against him; that thereupon at a term of said Court of General Sessions of the Peace, held in and for the said city and county of New York, at the City Hall in said city, before the said the Honorable Frederick Smyth, recorder, as aforesaid, on the 28th day of March in the year aforesaid, judgment was given in said court upon the said convic-
61 tion of murder, in the first degree; that the said appellant suffer the punishment of death in the mode and manner prescribed by the laws of this State, and the said court did thereupon appoint the week commencing the 12th day of May, 1890, the week within which said judgment was to be executed; that thereupon the said appellant duly appealed from the said judgment to the Court of Appeals of the State of New York, and by reason of the said appeal the execution of the said judgment and sentence was stayed pending the determination of the said appeal; that thereafter, at a term of said Court of Appeals, held at the Capitol, in the city of Albany,
62 on the 7th day of October, 1890, the said judgment of said Court of General Sessions of the Peace in and for the city and county of New York, so appealed from as aforesaid, was, by the judgment of the said Court of Appeals, in all things affirmed, and the record therein and the proceedings in the said last mentioned court upon the said appeal were, by the said judgment remitted to said Court of General Sessions of the Peace in and for the city and county of New York, there to be proceeded upon according to law; that thereafter, at a term of said Court of General Sessions of the Peace held in and for the said city and county of New York, at the city hall in said city of New York, on the 15th
63 day of October, 1890, the said judgment of the said Court of Appeals was, by an order then and there duly made and entered, by the said Court of General Sessions of the Peace in and for the city and county of New York, made the judgment of the said Court of Gen-

eral Sessions of the Peace, and the said judgment was then and there by the same order directed to be enforced and carried into execution and effect.

Deponent further says that at a term of said Court of General Sessions of the Peace in and for the city and county of New York, held at the City Hall, in said city of New York, on the 31st day of October, 1890, before the Honorable Frederick Smyth, recorder of the said city of New York and presiding justice of the said court, said appellant having been duly arraigned and being then and there present in court, it was ordered by the said court, by an order then and there duly made and entered, that the said appellant for the murder in the first degree aforesaid, whereof he had been convicted as aforesaid, and sentenced to the punishment of death, be remanded to the custody of the warden and agent of the State Prison of the State of New York, at Sing Sing in said State of New York, there to be kept in solitary confinement until the week commencing on Monday the first day of December, 1890, and that upon a day within the week so appointed the said agent and warden of the State Prison at Sing Sing do execution upon the said appellant in the manner and form prescribed by the laws of the State of New York.

Deponent further says, that at no stage of the said proceedings prior to the 31st day of October, 1890, when, having been previously indicted, tried, convicted and sentenced to suffer the punishment of death as aforesaid, the defendant was arraigned for re-sentence as aforesaid, was any objection made by or on behalf of the appellant either in the way of challenge or otherwise, to the absence or exclusion of persons of African descent and color from the grand jury by which said indictment was found, or from the panel from which said grand jury was selected, or from the petit jury by which appellant was tried, or from the panel of talesmen from which said petit jury was selected; and further deponent saith not.

JOHN SPARKS.

Subscribed and sworn to before me, this 5th day of February, 1891.

JOHN A SHIELDS,

Clerk of the Circuit Court of the United States for the Southern District of New York.